In the Supreme Court of the United States

October Term, 1947.

No. 30.

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

RIVERSIDE CEMENT CO.,

Respondent.

BRIEF OF RESPONDENT RIVERSIDE CEMENT CO.

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BRIEF OF RESPONDENT RIVERSIDE CEMENT CO.

Statement of the Case.

This matter and its companion causes (Nos. 23-29 and 31-34) come before the Court on *certiorari* granted to review a judgment of the Circuit Court of Appeals for the Seventh Circuit, 157 F. (2d) 433, setting aside a cease and desist order entered by the Federal Trade Commission on July 17, 1943. The statement of the case in its larger aspects is set forth in the brief of respondents in cases Nos. 23, 24 and 34, to which statement this respondent respectfully makes reference.

The Facts With Reference to Riverside.

Riverside is a Delaware corporation and was organized in 1928, at which time it took over the properties of its predecessor, Riverside Portland Cement Company, a California corporation. [17 R.* 13217-13220.] It is not

*Denoting volume and pages of printed record.

affiliated with any other cement company. It owns two mills, one at Crestmore, California, 56 miles from Los Angeles (6 miles from Riverside), and the other at Oro Grande, California, 110 miles from Los Angeles. The Oro Grande mill was formerly used for standby purposes and was not in operation from 1928 until 1942. [17 R. 13217-18.] The Crestmore mill's capacity is approximately 3,000,000 barrels annually, that of the Oro Grande mill approximately 1,500,000 barrels annually. [17 R. 13218.]

Riverside's normal intrastate sales area comprises southern California south of the Tehachapi, although some sales are made in the southern portion of the San Joaquin Valley. The metropolitan areas of Los Angeles and of San Diego and their respective surrounding communities constitute Riverside's principal sales markets. [17 R. 13218.]

Riverside's marketing territory in California is an isolated one, due primarily to the sweep of the Mojave Desert north and east of the coastal area of southern California. Little or no cement is sold in the southeastern part of the state in the small communities in Imperial Valley. Beyond the Mojave and other deserts lie the areas to which Riverside ships in interstate commerce. In Arizona shipments are made mainly to the central portion of that state bounded on the east by Tucson and Phoenix. In southern Nevada shipments are made mainly to the Las Vegas area. Riverside sales in interstate commerce, namely, to purchasers in states other than California, average approxi-

mately 6% of its total sales volume. Negligible quantities are at times shipped to Hawaii. [17 R. 13221-2.] Riverside's principal competitors are California Portland Cement Company (plant at Colton, California), Southwestern Portland Cement Company (plants at Victorville, California, and El Paso, Texas), Monolith Portland Cement Company (plant at Monolith, California), Santa Cruz Portland Cement Company (plant at Davenport, California, silos at Long Beach, California), Blue Diamond Corporation (plant at Los Angeles, California). Competition with companies other than those named is sporadic and negligible. [17 R. 13218-19.]

It should also be mentioned that due to the great distance freightwise between the California markets in which Riverside sells and the plant locations of out-of-state mills, it is impracticable for such mills to ship into Riverside's California markets with the result that competition in California between Riverside and out-of-state mills does not exist. [17 R. 13036-37.]

The only competition Riverside ordinarily has with any mill situated without the State of California is with the El Paso, Texas, mill of the Southwestern Portland Cement Company. [16 R. 11847.] This mill ships into eastern Arizona and the areas centering around Phoenix and Tucson in the central part of that state. [16 R. 11844.] Competitive conditions in Arizona, as between Riverside and the other California mills on the one hand and the El Paso mill on the other, will be dealt with more in detail

later herein in connection with our discussion of Riverside's marketing and pricing methods.

The picture thus presented, so far as Riverside and its marketing area are concerned, is one of almost complete isolation from the outside world. As a result it will be found that the marketing practices and methods of Riverside and its local competitors differ most radically, not only from those of the mills east of the Rockies, but even from those of the central California mills. For instance, an important differentiating feature lies in the fact that most of the main line railroads in Riverside's sales area were constructed by means of land grants-in-aid. As a result, the United States Government has been especially interested in this area, both within the State of California and without, in obtaining cement F. O. B. mill in order that the same may be shipped on Government bills of lading at the cheaper land grant rates. The evidence in this connection is undisputed that Riverside has uniformly and consistently bid F. O. B. mill for shipment on Government bill of lading whenever the Government asked for such bids. Respondent's Exhibit 3450-A to 3450-Z-10 evidences *907* bids of this nature by Riverside, 32 of them to railroads and the balance, 875, to Government or other public agencies.

It is also undisputed that the frequently mentioned Cement Institute freight rate books have never been used in Riverside's sales area [17 R. 13224]; nor has any appreciable amount of foreign cement been imported into Riverside's sales area for years. [17 R.

13226.] The practice of imposing punitive or disciplinary bases in Riverside's sales area is unknown. Concessions in price to Governmental agencies are freely given. [Comm. Ex. 967-9K.]

As for the multiple basing point system described in the complaint, *the Commission itself found in 1933 that the use of the same had been abandoned in Riverside's marketing area prior to the time when Riverside became a member of the Cement Institute.** (Senate Document No. 71, 73d Congress, 1st Session.) In southern California commercial prices are quoted by printed price lists showing destination prices in *zones* circumscribing urban or groups of urban areas. [17 R. 13221.] In out state shipments, Riverside's policy is to quote by printed price list showing destination prices reflecting its own mill-net plus freight, except where competition forces a lower price. [17 R. 13222.]

Further details as to the evidence material to Riverside's case are set forth in connection with our discussions of the sufficiency of the evidence to support certain findings.

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*Riverside joined the Institute on June 15, 1933, in order to have a voice in the formulation of the Cement Code. It resigned therefrom on November 1, 1939. [17 R. 13223.]

Summary of the Argument.

I. The failure of the Commission to find as to basic facts.

A. The Commission wholly failed to find as to the basic issue upon which its Count I was predicated, namely, the existence of a nationwide combination in restraint of trade.

B. Assuming that the Commission did in fact find as to the existence of the asserted combination, it wholly failed to find upon the issue, basic as to Riverside, as to whether the latter had knowingly participated therein.

II. If the Commission had found against Riverside, such findings would not have been supported by evidence.

A. The evidence as to Riverside's trade practices was wholly insufficient to warrant any inference or finding (if the Commission had so found) of uniformity brought about as a result of participation in the combination charged.

1. Alleged use of basing point "system."

   a. Riverside's marketing and pricing methods.

      (1) Pricing in California (intrastate).

      (2) Pricing in Arizona and Southern Nevada (interstate).

   b. The basing point "system" as defined in the complaint.

2. Non-use of freight rate books.

3. The undisputed evidence was that Riverside does and always has bid f. o. b. mill to any purchaser who desires f. o. b. mill delivery.

4. Punitive bases.

5. Trucking.

6. Diversions in transit.

7. Asserted standardization of terms of sale.

8. Dealer classifications.

9. Asserted discrimination against foreign cement.

10. Miscellaneous.

11. Conclusion—the Commission wholly failed to prove any case as against Riverside.

III. The Circuit Court of Appeals did not err in its rulings on the incompetency of certain evidence.

A. Evidence as to activities under the Code.

1. Evidence of Riverside's activities under the Code was incompetent because not connected up with proof of similar acts outside of the Code immunity period.

B. The Treanor letter.

IV. The evidence was insufficient to support any finding or order against Riverside under Count II of the complaint.

A. "Price" means destination price as between truly competitive buyers.

ARGUMENT.

I. The Failure of the Commission to Find as to Basic Facts.

A. The Commission Wholly Failed to Find as to the Basic Issue Upon Which Its Count I Was Predicated, Namely, the Existence of a Nation-wide Combination in Restraint of Trade.

This Court has heretofore said that "the administrative process will best be vindicated by clarity in its exercise." *Phelps Dodge Corp. v. National Labor Relations Board,* 313 U. S. 177, 197. Tested by this eminently proper standard, the findings in the instant proceeding leave more than a little to be desired.

The basic charge underlying Count I was, in substance, that "respondents" had maintained and have in effect a combination among themselves to restrain competition in price in interstate commerce. This was denied point blank by all of the respondents below.

With the issue thus clearly drawn, one would naturally expect that the Commission would have found, clearly and without equivocation, either one way or the other, as to whether the combination it charged did or did not have any existence in fact. We search in vain, however, for any specific finding upon this paramount issue.

The word "combination" does not even appear in the findings until Paragraph Twenty-four is reached; it is then used only with reference to the asserted price discrimination charged in Count II. True, in Paragraph Twenty-six (and last) the Commission does find that "the *capacity*,

tendency and *effect** of the combination maintained by respondents in the manner aforesaid and the acts and practices performed thereunder and in connection therewith by said respondents, as set out herein, has been and is to hinder, lessen, restrain and suppress competition. . . ." This, however, is but a finding as to the *result* of the asserted combination, not of its *existence* as a fact. To support its order in the particular under discussion, the Commission should have found (1) that a combination actually existed, and (2) that its effect or result was to restrain trade. These are two separate and distinct issues; and if we concede that the Commission has found as to the second, it makes but more apparent the total absence of a finding as to the first.

In view of the fact that the case was tried below by the Commission upon the theory that the proceeding was concerned wholly with the question of an alleged combination [16 R. 12129], the Commission's evasion of this main issue—the very *existence* of such a combination—is wholly inexplicable.

This evasion becomes even more marked when Paragraph Six of the Findings [24 R. 15983] is compared with the specific charge of combination set forth in the complaint in Paragraphs 4 and 5 thereof. [1 R. 48, 54.]

Paragraph Six, which attempts to deal with the alleged nationwide combination,** wholly fails to meet the mark. It opens with the assertion that "records of co-operative

*Emphasis here, as elsewhere, is supplied unless otherwise noted.

**Subsequent findings down to Paragraph Twenty-six deal either with the Commission's views as to trade practices, or with the asserted price discrimination charged in Count II.

activity" among *cement producers* from 1902 on* show that the *cement industry* has evidenced a strong aversion to free competition; and that its *members* (from 1902 on, we presume) by understandings and agreements, it is said, developed and maintained "substantial" uniformity of action among themselves with respect to "practically" every "marketing procedure" which involves price or other competition. A "remarkable" continuity of action, we are told, is also demonstrated. *Some* (?) of the current practices originated in "agreements" entered into as long as twenty or thirty years ago and have persisted, with the support of "collective action" in "substantially" their "original" form. Other (?) practices, it seems, having "similar" origin have been modified or extended by "collective" action, as "circumstances" required, into their "current" form.

So far in the paragraph the Commission has industriously refrained from mentioning, as such, any respondent in this case. It now hastens to remedy this deficiency, but, in so doing, it only makes matters worse. To resume:

> "*Some* of the respondents (*which?*) have been parties to 'substantially' all of these 'activities'; *other* respondents (*which?*) have participated in a 'lesser' degree, or 'fully' or 'partially' for shorter periods of time; *other respondents* (again which?) *have been mere followers,* adopting and supporting the practices (?) of their more active associates; and a *few* respondents (still, *which?*) have 'from time to time,'

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*It should be borne in mind that it is the Commission's present thesis—first manifested in the Circuit Court of Appeals—that the "conspiracy" consisted of acts done during the existence of the Institute; which is to say, from *1929* on: Com. Brief before 7th Circuit, pp. 189, 274.

for various reasons (?) participated only 'reluctantly' in 'some' of the practices, and have occasionally opposed for a time 'particular instances' of 'group action.'" [24 R. 15984.]

Eliminating, as we may (*Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 295 U. S. 193, 201-2; *A. E. Staley Mfg. Co. v. Federal Trade Com.*, 7 Cir., 144 F. (2d) 221-222) the quotations from the evidence with which the balance of the paragraph abounds, the Commission then goes on (subparagraph b) to find that these "long-pursued restraints of competition" have engendered a belief in the industry that free and open competition is impracticable and have fostered a *philosophy* of not attempting to excel in quality or price or in affording more attractive terms of sale. In subparagraph (c) the Commission concedes that "of course" there have been instances where "cement manufacturers' have made concessions in price or terms of sale; and it even grants that in particular areas (where, it does not state*), "numerous" concessions have been made. Those examples, however, it concludes are exceptions to the general rule of "continued and regular" uniformity in prices and terms and conditions of sale.

So much for Paragraph Six. Its obliquity is characteristic of the findings in their entirety. If the administrative process is best vindicated by clarity in its exercise, the Commission has sadly fallen short of the mark in this proceeding. A reviewing court is not bound to accept

*Frankness should certainly have compelled a specific finding in Riverside's favor on this issue. [See, for example, Com. Ex. 967-9K; also 17 R. 13222.]

findings which are beclouded by ambiguity or uncertainty. *National Labor Relations Board v. Virginia Light & Power Co.*, 314 U .S. 469, 476. In the absence of a finding of essential basic facts, the order of the Commission cannot be sustained. *Florida v. United States*, 282 U. S. 194, 215. The lack of express findings by an administrative agency may not be supplied by implication. *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 295 U. S. 193, 202; *A. E. Staley M'f'g. Co. v. Secretary of Agriculture*, 7 Cir., 120 F. (2d) 258, 261.

The Commission does, of course, contend that the findings subsequent to Paragraph Six, and dealing with asserted uniformity of action, amount to the equivalent of a finding as to the existence of the conspiracy alleged. It is said that a comparison of the *complaint* with the *conclusions* of the Commission and its *order* reveal the *intention* and *understanding* of that body that its *findings* were adequate in the respect under discussion. The lameness of this line of argument is self-evident.

In the first place, we are not dealing with equivalents, or unilateral intentions or understandings. There either was a combination or there was not, and it was the duty of the Commission to find, one way or the other, as to this issue which it tendered. In the second place, if we concede that uniformity of action may under certain circumstances permit the drawing of an inference of combination, here it was the duty of the Commission to draw the inference, if warranted, and to find accordingly. *This it did not do;* and a court will neither draw the inference nor make the finding for it. *Corn Products Ref. Co. v. Federal Trade Commission*, 324 U. S. 726; *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 295 U. S.

193, 202; *A. E. Staley Mfg. Co. v. Secretary of Agriculture*, 7 Cir., 120 F. (2d) 258, 261.

For the above reasons it is respectfully submitted that the Commission has wholly failed to find, as a fact, the very existence of the combination upon which it predicated its Count I.

B. Assuming That the Commission Did in Fact Find as to the Existence of the Asserted Combination, It Wholly Failed to Find Upon the Issue, Basic as to Riverside, as to Whether the Latter Had Knowingly Participated Therein.

If our contention as to failure to find upon the issue of combination or conspiracy be upheld, such failure will, of course, be the equivalent to a finding as to that issue in favor of every respondent in the case. *Heuser v. Federal Trade Commission*, 7 Cir., 4 F. (2d) 632, 634. If, on the other hand, it be assumed for purposes of discussion that the Commission did find as to the *fact* of conspiracy, it is nevertheless demonstrable that the Commission wholly failed to find that Riverside knowingly participated therein.

To justify its order against Riverside, the Commission must have found, with support in the evidence, (a) that Riverside *knew* that other parties had combined to violate the law, and (b) thereafter knowingly cooperated to further the object of the conspiracy. *Allen v. United States*, 7 Cir., 4 F. (2d) 688, 691; *Minner v. United States*, 10 Cir., 57 F. (2d) 506, 511. There must be

both evidence and a *finding* of guilty knowledge upon the part of each alleged co-conspirator; each must share in the guilty knowledge and design. *Morrison v. California*, 291 U. S. 82, 92, 93. And if the Commission has not found that Riverside had knowledge of the combination alleged, and thereafter knowingly participated in the common design, the order cannot stand. *Heuser v. Federal Trade Commission, supra; Western Sugar Refining Co. v. Federal Trade Commission*, 9 Cir., 275 Fed. 725, 732.

We search the record in vain for such a finding. It is certainly not to be found in the use of the generic term "respondents" which is used throughout the findings. We say this for the reason that, as already ascertained from Paragraph Six, the term in question applies to four different categories: (1) parties to substantially *all* of the asserted activities; (2) those who have participated in lesser degree, or "fully or partially for shorter periods of time"; (3) *those who have been mere followers,* adopting and supporting the *practices* of their "more active" associates; and (4) those "few" who have from time to time, for various reasons, participated only "reluctantly" in some of the practices and have occasionally opposed for a time particular instances of "group" action.

It will be noted that there is no finding of *knowing* participation as to any of those groups. However, we need not base our contention here upon such a narrow ground, even though it be well taken. Let us assume, even absent a specific finding, that groups 1 and 2, the constant participants and the participants "in lesser de-

gree," were knowing and, hence, guilty participants of an assumed combination and that the Commission has at least inferentially so found.

This brings us to groups 3 and 4, the "mere followers" of the practices of the others and the few who have reluctantly participated in *some* of the practices and opposed others. The practices referred to, we learn from the context of Paragraph Six, are the current practices of the industry, also sarcastically referred to by the Commission as "customs of the trade." Groups 3 and 4, then, are found to have been, at worst, mere followers of current trade practices and, as to a few, reluctant and recalcitrant followers at that.

We submit that giving the most liberal construction possible to these findings that the Commission has wholly failed to find any guilty participation *at least* as to the groups 3 and 4 "respondents." It is well settled that pricing patterns and trade practices resulting from follow-the-leader tactics afford no evidence of either the existence of or participation in an unlawful combination. *Cement Mfrs. Protective Ass'n v. United States*, 268 U. S. 588, 605; *United States v. International Harvester Co.*, 274 U. S. 693, 708-9; *United States v. Standard Oil Co.* (D. C. Mo.), 47 F. (2d) 288, 316. By the same token, a finding as to such tactics is equally impotent.

We therefore perceive that in Paragraph Six of its findings, the Commission has effectually separated what we may term the sheep from the goats; but, and this is ob-

viously fatal to the efficacy of its findings, *it has utterly failed to find which were which.*

Viewed from the standpoint of the single respondent whom we represent, the situation is simply this: The Commission has (we assume) at least inferentially found that certain "respondents" were guilty and knowing participants; it has also found that other "respondents" were "mere followers" without any finding as to them either of knowledge of the combination or of knowing participation therein; it has made no finding that Riverside (or for that matter any other designated respondent) either had knowledge of the combination or knowingly participated therein. This failure to find upon this always basic issue in a conspiracy case amounts to a finding in Riverside's favor as to such issue. *Heuser v. Federal Trade Commission, supra.* It follows that the findings are wholly insufficient to support the order as to Riverside (let alone all of the other respondents, as to whom the findings are in precisely the same ambiguous condition).

II. If the Commission Had Found Against Riverside, Such Findings Would Not Have Been Supported by Evidence.

Riverside's defense on the merits was, in a nutshell, that its policies and practices were so at variance with those found by the Commission to have existed elsewhere in the country that any inference or finding against it, if made, would have been without substantial support in the evidence. The Commission does not deny that this is a valid defense, if made out. That it was made out is not open to serious question.

A. The Evidence as to Riverside's Trade Practices Was Wholly Insufficient to Warrant Any Inference or Finding (if the Commission Had so Found) of Uniformity Brought About as a Result of Participation in the Combination Charged.

The case alleged in the complaint was one of allegedly agreed uniformity of action as regards certain customs and practices of the trade. Riverside's answer to this was two-fold: (1) As to most of Riverside's trade practices, the evidence utterly fails to show the "uniformity" of which the Commission boasts, and (2) in any event, and as to such practices as reveal an illusory similarity or even identity with those of the other respondents, the record reveals no evidence whatever sufficient to overcome Riverside's showing that its trade practices were and are the result of independent action on its part, without agreement or collusion with anyone. [17 R. 13220-13227.]

Discussion of the evidence as to Riverside's trade practices follows.

1. Alleged Use of Basing Point "System."

The evidence was that the use of the so-called basing point "system" had been abandoned in Riverside's sales territory long prior to the time when Riverside joined the Institute on June 15, 1933. [Report of Federal Trade Commission to U. S. Senate, June 9, 1933, Senate Document No. 71, 73d Congress, 1st Session, pp. 37, 115, 127; also map facing p. 8, all discussed below; see also, 17 R. 13220-21.]

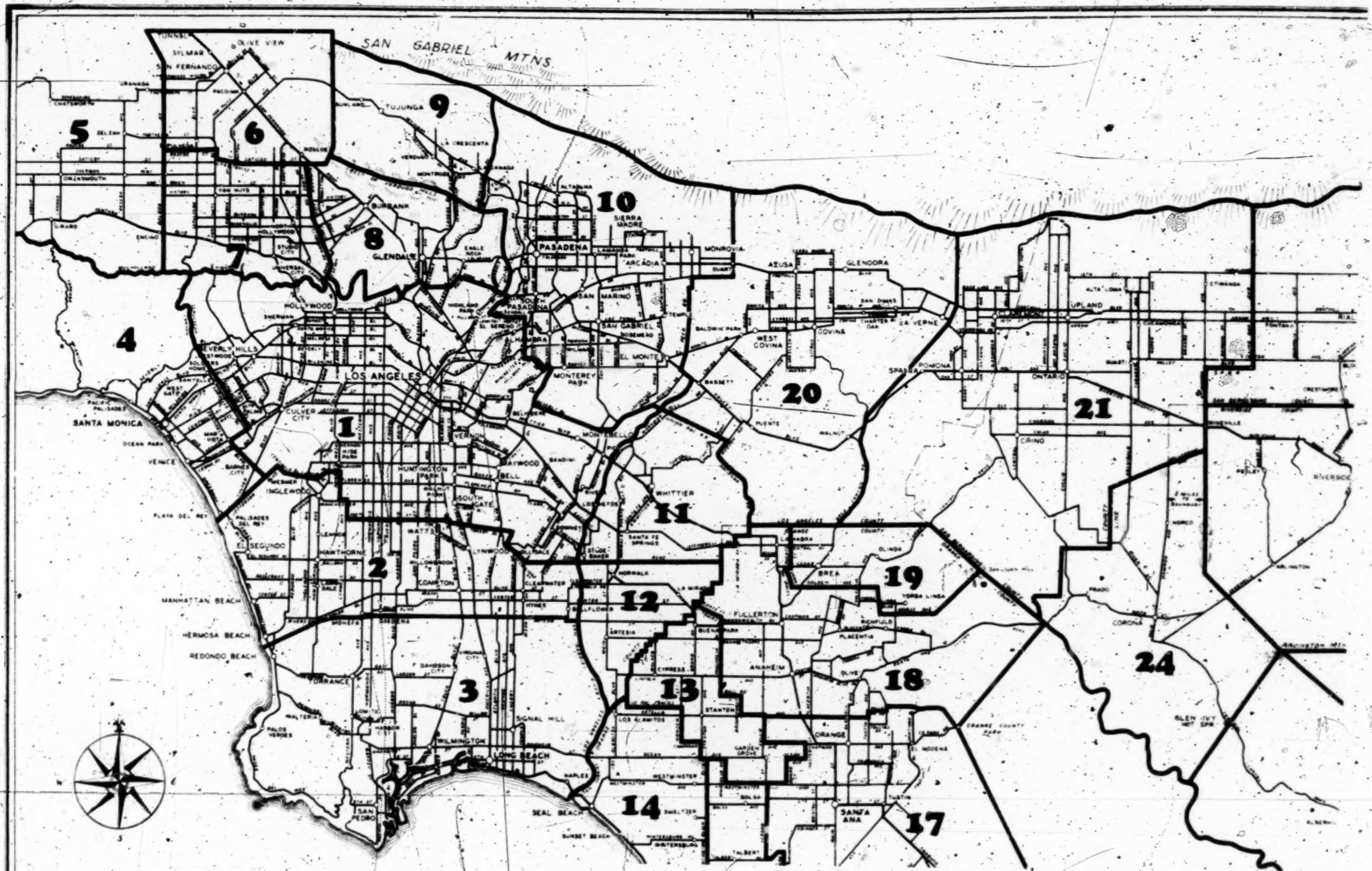
In this connection it will be recalled that the Commission found (Par. Seven) that in Southern California the basing point system is "modified" by an elaborate system of zone prices applicable in certain areas, while no finding at all is made as to Arizona and Nevada.

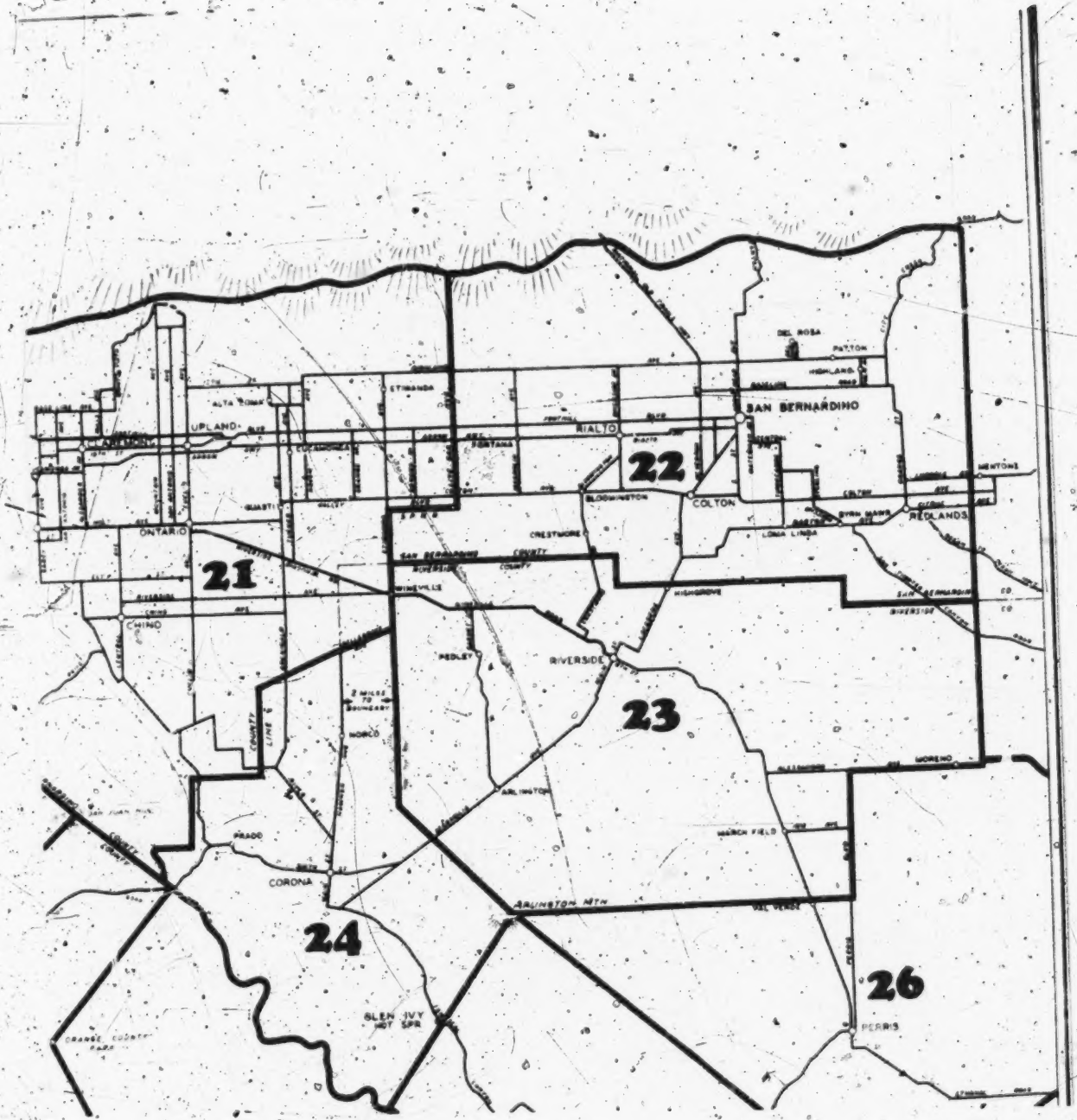
In addition, the following remark of counsel for the Commission is of some significance:

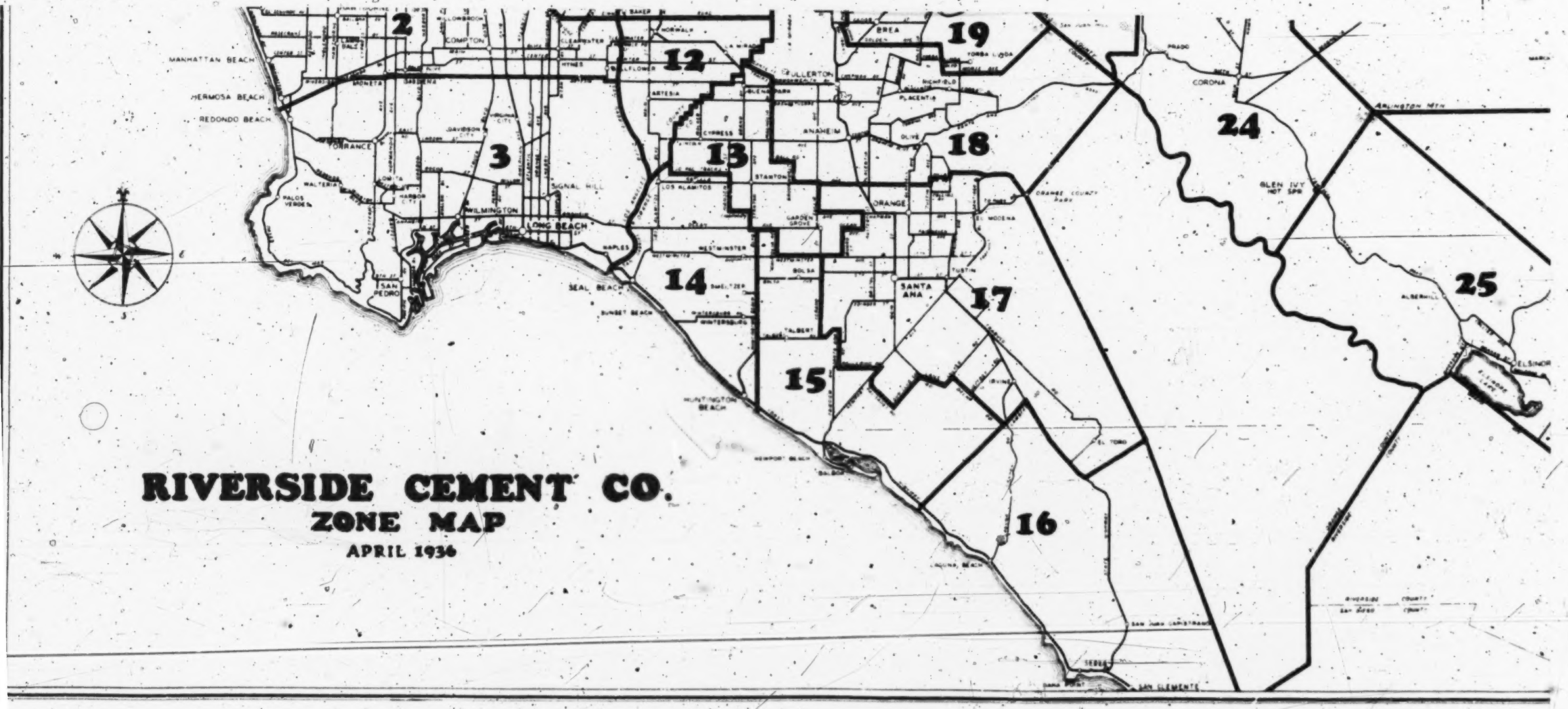
> "Mr. Wooden: Just for Your Honor's information, Counsel for the Commission have never contended for a moment that the basing-point system applied in full measure in Southern California and in Arizona, but that it was a combination of some territories on a zone price system and in other territories on a basing-point basis." [17 R. 13067.]

And, as we shall also show in the course of our discussion, the Commission itself has recognized the vital distinction between quoting destination prices by means of printed price lists (which Riverside has done for years) and quoting by the formula method which the Commission has seen fit to censure.

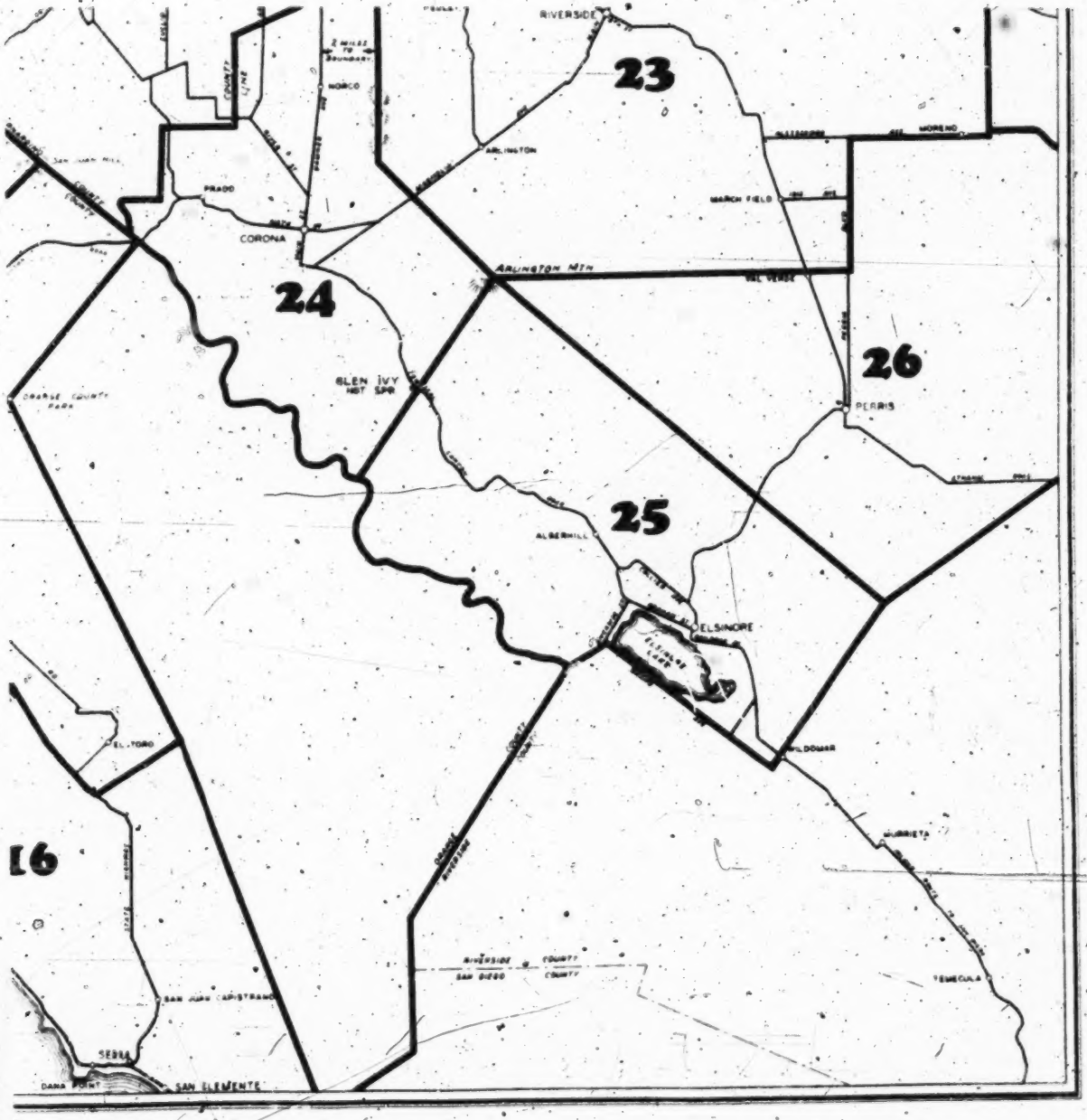
In order that the Court may judge the validity of Riverside's contention that the multiple basing point sys-


SAN GABRIEL MTNS
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PASADENA
GLENDALE
BURBANK
LONG BEACH
ANAHEIM
ORANGE
SANTA ANA
FULLERTON
TORRANCE
POMONA
MONTEREY PARK
HUNTINGTON PARK
WHITTIER
COMPTON
INGLEWOOD
BEVERLY HILLS
HOLLYWOOD
CULVER CITY
EL SEGUNDO
MANHATTAN BEACH
HERMOSA BEACH
REDONDO BEACH
SEAL BEACH
SIERRA MADRE
ARCADIA
MONROVIA
AZUSA
GLENDORA
COVINA
WEST COVINA
LA VERNE
UPLAND
ONTARIO
CHINO
BREA
PLACENTIA
YORBA LINDA
CORONA
RIVERSIDE
BELL
CERRITOS
NORWALK
SANTA FE SPRINGS
LA MIRADA
BUENA PARK
STANTON
LOS ALAMITOS
GARDEN GROVE
WESTMINSTER
HUNTINGTON BEACH
SAN PEDRO
WILMINGTON
SIGNAL HILL
LYNWOOD
SOUTH GATE
BELL GARDENS
MONTEBELLO
PICO RIVERA
WHITTIER
SAN GABRIEL
ROSEMEAD
EL MONTE
BALDWIN PARK
IRWINDALE
DUARTE
MONROVIA
SAN MARINO
SOUTH PASADENA
ALHAMBRA
MONTROSE
LA CRESCENTA
TUJUNGA
SUNLAND
SYLMAR
SAN FERNANDO
OLIVE VIEW
GRANADA HILLS
CHATSWORTH
NORTHRIDGE
RESEDA
VAN NUYS
ENCINO
TARZANA
WOODLAND HILLS
CANOGA PARK
WEST HILLS
LOMITA
PALOS VERDES
RANCHO PALOS VERDES
ROLLING HILLS
GARDENA
HAWTHORNE
LENNOX
WATTS
CARSON
DOMINGUEZ
WILMINGTON
LOS ALAMITOS
ROSSMOOR
CYPRESS
ARTESIA
DOWNEY
PARAMOUNT
BELLFLOWER
LAKEWOOD
HAWAIIAN GARDENS
LA HABRA
BREA
OLINDA
VILLA PARK
ORANGE COUNTY AIRPORT
EL MODENA
TUSTIN
IRVINE
SILVERADO
MODJESKA PEAK
SANTIAGO PEAK
SANTA ANA MTNS
GLEN IVY HOT SPRS
ALBERHILL
RIVERSIDE MTNS
SAN JACINTO MTNS
SAN BERNARDINO MTNS
SAN JACINTO
HEMET
PERRIS
MORENO
SUNNYMEAD
MORENO VALLEY
MARCH AFB
RIVERSIDE
ALESSANDRO
MURRIETA
TEMECULA
FALLBROOK
VISTA
OCEANSIDE
CAMP PENDLETON
SAN CLEMENTE
DANA POINT
LAGUNA BEACH
LAGUNA NIGUEL
MISSION VIEJO
LAKE FOREST
IRVINE
TUSTIN
SANTA ANA
ORANGE
ANAHEIM
FULLERTON
BREA
YORBA LINDA
PLACENTIA
CORONA
NORCO
EASTVALE
JURUPA
RIVERSIDE
ALESSANDRO
MORENO VALLEY
MARCH AFB
SUNNYMEAD
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SAN CLEMENTE
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LAGUNA NIGUEL
MISSION VIEJO
LAKE FOREST
CAMP PENDLETON
OCEANSIDE
VISTA
FALLBROOK
TEMECULA
MURRIETA


21
22
23
24
26
SAN BERNARDINO
RIALTO
COLTON
REDLANDS
ONTARIO
UPLAND
CHINO
RIVERSIDE
CORONA
PERRIS
ARLINGTON MTN
GLEN IVY HOT SPR



Reproduction of portion of Commission's Exhibit 1297 showing flat price area in Los Angeles Metropolitan District.



ce area in Los Angeles Metropolitan District.

tem as described in Paragraph Five of the complaint is not employed in its marketing area, it will perhaps be helpful if we sketch briefly the evolution and present status of Riverside's pricing methods.

(a) *Riverside's Marketing and Pricing Methods.*

(1) Pricing in California (Intrastate).

Prices in Southern California were based on Los Angeles until 1917, when the War Industries Board designated the Crestmore Mill of Riverside Portland Cement Company as the basing point for Southern California. [17 R. 13220.] Riverside's Southern California price lists reflected the policy of basing on Crestmore until about 1927, when due to the activity in the Los Angeles metropolitan area and to the prevalance of local trucking of cement it became impractical to observe disparities in prices reflecting rail freight differentials between nearby or adjacent communities. The establishment of flat zone prices followed. This method of pricing gradually spread throughout the whole of Southern California where any appreciable amount of cement is sold. [17 R. 13220-21.]

Zone pricing has obtained in Southern California up to the present day. Although for a number of years Riverside's published zone prices reflected generally, but by no means exactly, the rail freight to central zone points, this practice entirely ceased not later than April 1, 1936. Riverside's zone map of that date [Comm. Ex. 1297], coupled with its price list of that date [Comm. Ex. 1295], for example, quoted one blanket destination price for zones 1 to 26 as shown on Commission's Exhibit 1297. (See map.) This covers the distance from as far east as Redlands and Riverside, all of the Los Angeles metro-

politan area including the San Fernando Valley, the Beach cities, and all of Orange County (Santa Ana, Anaheim and Fullerton). The other zones each had prices different from the larger area and most of them were different from each other. [5 R. 3444.] *None of these zone prices bear any relation to rail rates.* [17 R. 13221.]

(2) Pricing in Arizona and Southern Nevada (Interstate).

The evidence was that Riverside's prices in Arizona and Nevada are published by price lists which reflect a constant mill net* as to all areas where it has a freight advantage over, or an equality of rates with, the El Paso mill of Southwestern Portland Cement Company [17 R. 13222.] This includes southern Nevada and the whole State of Arizona, except those areas east of Phoenix and Tucson (the principal consuming centers) where the El Paso mill of Southwestern Portland Cement Company has a freight advantage. This freight advantage is, naturally, reflected in the price structure in this latter area.

Riverside first made its presence felt in eastern Arizona in 1925, when it put out a price list which resulted in a lowering of prices throughout the entire territory. [16 R. 11854.] After that, in order to sell El Paso cement in eastern Arizona, Southwestern had to meet Riverside's lower price. This action of Riverside's also resulted in

*This mill net is not in any sense a commercial price,—least of all a "base price" in the sense in which counsel for the Commission employ that term. It is a "derived" mill net—derived by subtraction of freight from the destination prices, stripped of sacks and discount. The mill net only becomes a price when Riverside bids it as a price, as in the case of invitations for f.o.b. mill bids. In Southern California, as we have seen, the mill net bears no relation to destination prices.

a readjustment downward of El Paso's prices in New Mexico, where Riverside does not even sell.* [16 R. 11855.] Riverside has competed on its own terms in eastern Arizona ever since; a factor which, as we shall show, is utterly destructive of the Commission's contention that the multiple basing point method of quoting prices is used by Riverside.

As a matter of fact, the pricing pattern in Arizona is wholly determined by the railroad rate structure mentioned above. The evidence showed that as between the Southern California mills on the one hand and the El Paso mill on the other, the freight rate structure is an umbrella-like affair having its crest in the Phoenix-Prescott area in central Arizona, where the rates from Southern California and El Paso were blanketed at a common figure. [Comm. Exs. 1295, 1317.] The evidence also showed that the cement price structure followed the freight rate structure, rising from the west to the crest at Phoenix-Prescott and declining to the east toward El Paso. It is also undisputed that both the California mills and El Paso can and do institute *destination* price changes in eastern Arizona, where El Paso has the freight advantage [Resp. Exs. 1295, 3452] and the question immediately arises as to whether or not this is the "formula" method of quoting which the Commission condemns. To determine this, we must examine the Commission's own definition of the basing point system.

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*Compare, with this situation, the Commission's thesis that Riverside does not "compete" in eastern Arizona and that the public interest requires that it and its California competitors should be compelled to withdraw from that market because they are compelled to absorb freight in order to get there.

(b) *The Basing Point "System" as Defined in the Complaint.*

The following elements, according to Paragraph Five of the complaint, are essential parts of the basing point system:

(1) For any destination in the United States there is a governing basing point;

(2) Each basing point has its base price;

(3) The identity of the governing basing point is determined by calculating and comparing two factors: base price and rate of all rail freight to destination;

(4) Under the basing point system *delivered prices are quoted and charged on a formula:* the prevailing base price at the governing point plus all rail freight to the location of the customer.

Counsel for the Commission also said in their brief before the Commission (Part II, p. 46):

> *"The base price of course is announced by the base mills.* Unless these mills are recognized as price leaders and their base prices accepted, adopted and woven into the price structure by their competitors, *there can be no basing-point system."*

Counsel have also argued throughout the case that there are no non-base mills on the West Coast. All, they say, are "base mills."

Assuming this to be the case, it follows that the element of "phantom freight," as accruing to such mills, is not claimed to exist in so far as Riverside and its sales area are concerned. It likewise follows that the holdings of

this Court with reference to "phantom freight" in *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, and in *Corn Products Ref. Co. v. Federal Trade Commission*, 324 U. S. 726, have no application to Riverside.

With the foregoing facts in mind, a few pertinent questions will be helpful.

Is a mill which has no "announced base price" that can be "woven into the price structure," a basing point mill? Counsel for the Commission say no. Riverside neither has nor does it announce a "base price." The Arizona mill net is, as we have seen, purely a derived computation from a published destination price.

Is a mill which does not quote prices by the formula of base price plus freight, but rather with reference to published price lists setting forth current destination prices, operating under the basing point system? The Commission now argues that it is. *But the Commission has itself recognized the basic distinction between price-listing destination prices and quoting by the formula method.* In its report to the Senate in 1933 (Document No. 71, 73rd Congress, 3rd Session), the Commission reported as to southern California mills (p. 115):

> "*Basing Points.*—The principal basing point used by southern California mills was Crestmore, the location of the Riverside Cement Company's mill, *when basing points were used in determining delivered prices. Fixing prices by the basing-point method has been abandoned and prices are now fixed by price*

lists circulated among manufacturers and dealers showing the price to dealers at all delivery points."*

Nor is this all. At page 127 of Senate Document No. 71, the Commission also recognized that even where listed destination prices are admittedly derived from a mill base price, *but the base utilized is that of the mill nearest the destination*, the basing point method "as it is understood and applied in the eastern part of the United States" (*i. e.*, the method described in the complaint herein) is not in use.

The Commission was, at page 127, dealing with the cessation of basing point practices in the northern California area in 1929. After noting that the Davenport mill of the Santa Cruz Company was the basing point of all the northern California mills until August 12, 1929, the Commission went on to say:

> "On August 12, 1929, the Henry Cowell Lime & Cement Co. inaugurated the practice of basing prices on the mill nearest destination and issued a price list showing destination prices in a large number of towns in California, Nevada, and Oregon, based on $2.45 per barrel at each of the northern California mills, plus freight to destination."

The effect of this, of course, was to change the destination price, say at San Francisco, from a Davenport plus freight to a nearest mill plus freight basis. Each mill in the area then began quoting destination prices which, less freight, gave its own mill net in its own favorable freight

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*A copy of Senate Document No. 71 was handed to each of the Federal Trade Commissioners at the oral argument below. [Tr. of Argument, May 4, 1942, pp. 536-537.]

area, *and not somebody else's,* which is the badge of the Commission's concept of "what is known as a multiple basing point system."

The Commission's recognition of this fact was apparent. We again quote from page 127:

> "This was an important change in the method of establishing destination prices and caused price reductions at all points in the northern California territory except those where the freight rate from Davenport controlled. This ended the basing-point method of determining delivered prices as it is understood and applied in the eastern part of the United States and substituted therefor the price-list method."

In other words, when *each* mill in the northern California area became what the Commission is now pleased to term a "base" mill and quoted destination prices reflecting freight from the nearest mill, with each mill free to raise or lower prices through the entire area on its own, as distinguished from Davenport's, initiative the Commission found, quite rightly, that the basing point system is no longer employed.

The point of all this is that this substantially parallels the competitive conditions in eastern Arizona. Riverside's prices in that area, for example, reflect back, freightwise to El Paso, as being the nearest mill. And Respondent's Exhibit 3452 evidences 10 price changes effective in eastern Arizona instituted by Riverside alone between 1930 and 1940. If the so-called basing point system were being used by Riverside, those price changes would indicate that Riverside was the basing point. In such case, however, the destination price to an eastern Arizona point, say Bisbee, would have been Crestmore plus freight, which it de-

cidedly was not. On the other hand, assuming El Paso was the basing point, it, and it alone, would have done the price changing in its own favorable freight area in those instances, which it did not do.

The same situation with reference to price changes obtains in the Southern California zones. Respondent's Exhibit 3451 indicates, during the decade above mentioned, indiscriminate price changes instituted severally by Riverside, California Portland, Southwestern and Monolith. Let alone the undisputed fact that those were flat zone destination prices, as distinguished from "formula" prices, obviously this presents no basing point picture.

We have referred above to the Commission's report to the Senate embodied in their Document No. 71. That document, in addition to the excerpts we have set forth, also contains other material which shows that the Commission then recognized that the formula method under attack was and is not in use on the Pacific Coast. We quote further:

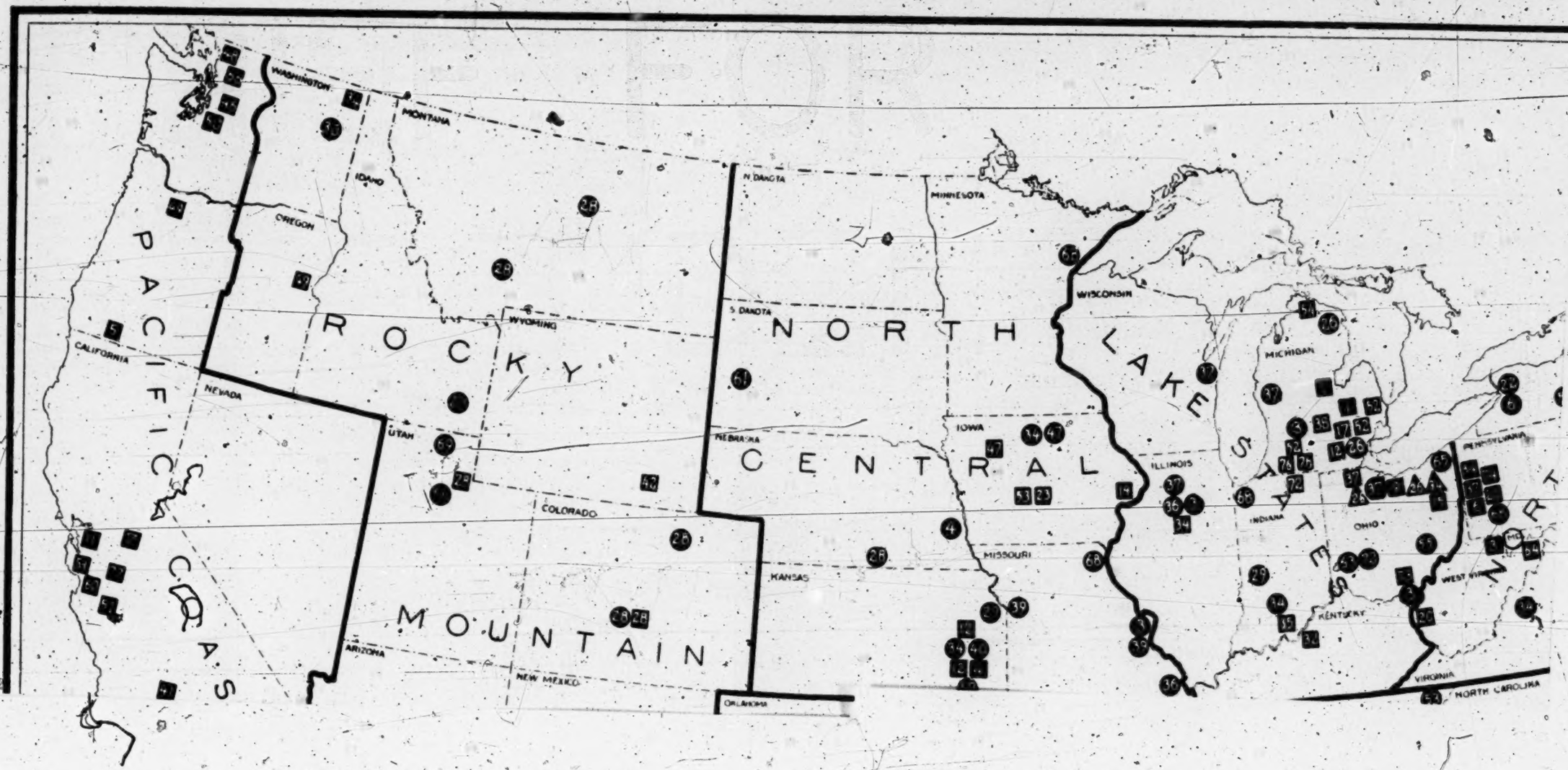
> "The 69 locations or points used as basing points for computing delivered prices of cement represent 107 cement mills and 2 silo distributing plants. The 69 basing points govern and control delivered price quotations throughout the United States, except in the arbitrary price areas and the *Pacific coast section, which has a different method of fixing prices. Aside from the Pacific coast section there are 51 cement mills which are not basing points.*" (Senate Doc. No. 71, p. 37.)

The Commission further recognized this difference in pricing practices on the Pacific Coast, when it set forth, opposite page 8 of Senate Document No. 71, a map which

PORTLAND CEMENT MILLS OF THE UNITED STATES

JANUARY 1, 1932.

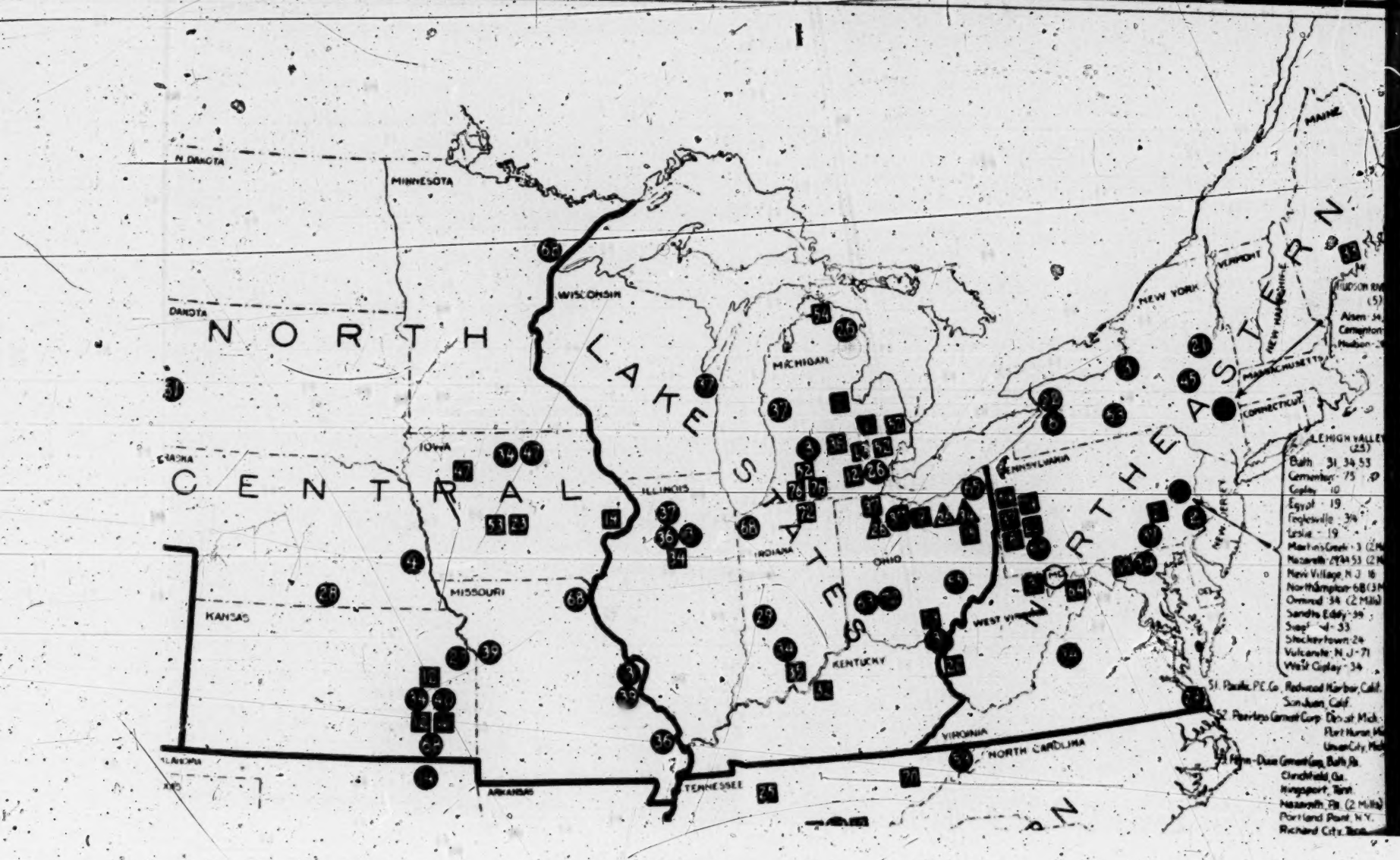
■ Cement Mill. ● Cement mill located at basing point. ▲ Silo basing point.

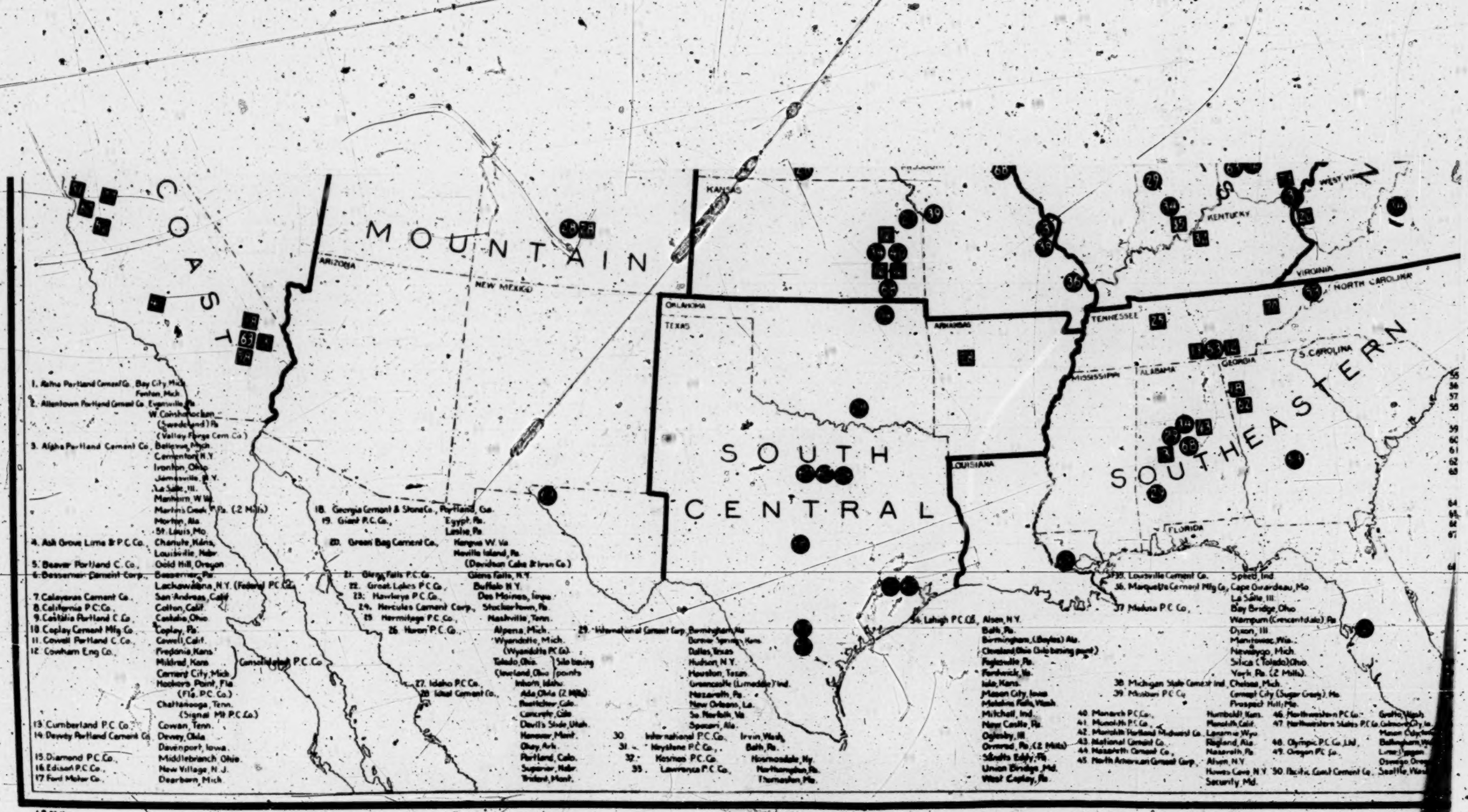


MILLS OF THE UNITED STATES

JANUARY 1, 1932.

ent mill located at basing point. ▲ Silo basing point.





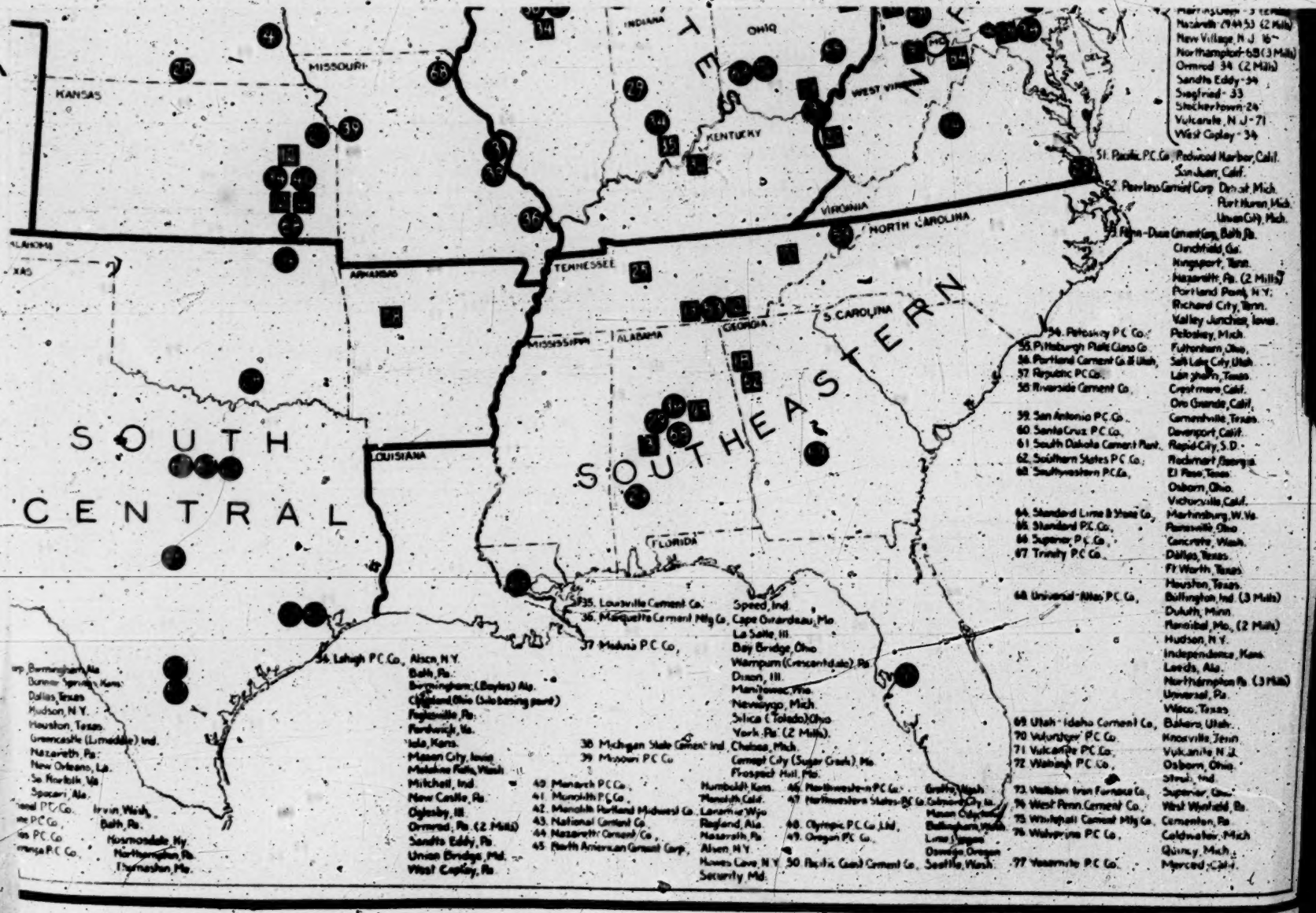
Reproduction of Federal Trade Commission map Appearing opposite page 8 of Senate Document No. 71, 73rd Congress, 1st Session and showing total absence of basing points in California and the Pacific Northwest.

graphically set forth the fact that *there was not a basing point in the State of California*, or for that matter on the entire Pacific Coast west of the Cascade Mountains. We here set forth a facsimile of this map and desire to call this Court's attention to it as fully supporting the evidence relied upon by Riverside as to this phase of the case.

The Commission does not even pretend that this situation has in any way changed in Riverside's section of the country since 1933 and certainly the evidence shows nothing of the sort. Riverside therefore submits that as to this important feature of the case the Commission was right in 1933 and that it is demonstrably wrong now in its professed views as to the use of the basing point system on the West Coast; and that the evidence permits no other conclusion.

The fallacy, we think, lies in the Commission's present misuse of the term "base mill." As the Commission found in 1933, where each mill price-lists destination prices freightwise from its own mill, the basing point system is not in use. This is evident for two reasons: First, formula quoting in the basing point sense is not used, and second, *there are no non-base mills.*

It is quite evident, however, that the Commission now takes the position that any mill whose destination prices reflect in any way its *own* increasing freight rates as sales are made away from the mill, as distinguished from somebody else's freight rates, is a base mill in the basing point sense. *This cannot be, for, as we have seen, the badge of basing point pricing is not the fact that mills quote their own base price plus freight, but the fact that non-base mills quote some other mill's base price plus its*



Appearing opposite page 8 of Senate Document No. 71, 73rd Congress, 1st Session,
nce of basing points in California and the Pacific Northwest.

179584—33. (Face p. 8.)

freight in their own favorable freight area. This is precisely what is not done in Riverside's marketing area, either in Arizona or anywhere else.

Under the basing point system as alleged in the complaint, the base mill does the price changing. Here again the Arizona pattern is wholly different. Riverside raises and lowers the price in eastern Arizona whenever it feels it proper to do so. So does El Paso and so do the other California mills, for that matter. This is wholly contrary to alleged basing point practice, for the simple reason that there is no basing point mill whose prices in a given area are blindly followed by others.

From what we have said, it is certainly clear that formula pricing is not observed by Riverside or anybody else, even in Arizona, let alone in southern California, where admittedly zone prices prevail. When Riverside quotes in eastern Arizona, it quotes from its own price list for the destination involved. When it raises or lowers a price in eastern Arizona, it puts out a new list showing increases or decreases, as the case may be, over the destination prices shown in the previous list. What El Paso nets in such a case is a matter of supreme indifference to Riverside. And whether El Paso chooses to meet the price change or to substitute a different one of its own, is entirely its own business. This, of course, is a procedure utterly foreign to the Commission's theory of basing point practice. Under that "system," as alleged in the complaint, the El Paso mill, if a "base-mill," would be monarch of all it surveyed east of Phoenix, due to its favorable freight rates. Or, on the other hand, if it were a "non-base" mill according to the formula system, one of the California mills would necessarily be the base mill and the price in

eastern Arizona would be California plus freight, which it most emphatically is not. [Comm. Ex. 1295, 1317.] The answer is that none of these competing mills are either "base mills" or "non-base mills" in the formula sense; which means that any inference to the contrary, such as the Commission has attempted to draw here, is wholly contrary to the evidence.

The Commission's brief wholly avoids the undisputed evidence we have just discussed as to Riverside's actual pricing methods, and contents itself with referring to the Commission's finding that in Southern California "the basing-point system of pricing is modified by an elaborate system of zone prices applicable in certain areas" and to certain asserted admissions along this line by Riverside officials. In so doing the Commission palpably seeks to substitute semantics for evidence.

As for the finding in question, since the Commission has found the existence of an "elaborate" system of zone prices applicable in certain areas (which areas, the undisputed evidence showed constituted *all* of Southern California where cement is sold: [Comm. Ex. 1297]) it has actually found that "what is known as a multiple basing point system of pricing" with its "governing basing point" and factors of "prevailing base price" and "all rail freight" has in fact been "modified" out of existence.* In any event, and be this as it may, certainly the finding, viewed in the light of the undisputed evidence that *all* of Southern California where cement is sold is zoned shows

*It will be recalled that on June 9, 1933, six days before Riverside joined the Cement Institute, the Commission reported to the Senate that the basing point method had been *abandoned* in Southern California.

such a radical departure from basing point practices as utterly to negative any claim that Riverside had "combined" to support them.

As to the so-called "admissions" the witness Leonard testified as follows concerning the exhibits which the Commission cites in its present brief:

> "'Q. Now, is it any different other than a little further modification through the use of the zone systems today than from the day on which you wrote this letter? A. I think it is, and I think that it was a mistake to call it a modified zoning system. As I recall those questionnaires, the questionnaire itself described what was sought to be their description of a basing point. I never felt that we were operating on any basing point system as I heard it out here, as I have heard descriptions of what it is supposed to be in other parts of the country. I am not familiar with it. But at the time, in writing those letters, I am assuming or taking the description of a basing point system that the questionnaire itself outlined, and I don't think it is correct to say today that it is any modified zoning system of a basing point system. There are just literally hundreds of different mill nets in Southern California depending on the manner of delivery and the destination and the spot in a destination. In Los Angeles, for instance, we don't know until we have made a delivery what the mill net is going to be, because we don't know the manner in which the delivery is going to be made until the order is delivered.' [5 R. 3452.]

It is also worthy of note that on the same page of the answer to the questionnaire above referred to there appeared the following specified zones of uniform delivered prices as of certain dates, to-wit:

"June, 1925—All of southern California excepting port territories;

"January, 1928—Metropolitan Los Angeles area;

"June, 1932, and January, 1933—All of southern California, excepting San Diego County, San Bernardino County east of Cajon Pass, and Santa Barbara County north of Gaviota."

And, as we have seen, ultimately *all* of Southern California was zoned, save for inaccessible mountain territory. [Comm. Ex. 1297.]

This condition has obtained down to the present day.

It will thus be seen, a fact which the Commission industriously ignores, that the whole trend in Southern California has been *away* from basing point practices, starting as early as 1925, *eight years before Riverside joined the Cement Institute.*

As far as Arizona and Southern Nevada are concerned the Commission made no finding at all and its brief is likewise silent as to Riverside's interstate practices, which are as we have shown.

Upon this showing it is respectfully submitted that Riverside's defense as to non-use of basing point methods has been made out; and that there is no substantial evidence to the contrary. We now turn to the other matters mentioned by the Commission in its attempt to show nation-wide uniformity of practices.

2. Non-use of Freight Rate Books.

The Trial Examiner reported [Par. 115, 22 R. 15710] that the Institute freight rate books have never covered California, Arizona or Nevada, Riverside's marketing area. Riverside's evidence was that it has never used them. [17 R. 13224.] The Commission has not found to the contrary, its finding and its present contention being that the rate books have been published "for substantially every State *east of the Rocky Mountains.*" [Par. Eight (c), 24 R. 16008; Comm. Br. p. 70.]

3. The Undisputed Evidence Was That Riverside Does and Always Has Bid F. O. B. Mill to Any Purchaser Who Desires F. O. B. Mill Delivery.

With the exception of occasional and sporadic truck pickups by commercial buyers, the only purchasers in Riverside's experience who desire mill delivery are public agencies having a freight rate advantage and the railroads.

On sales to governmental agencies for ultimate use within or without the State of California, Riverside's practice is to permit the Government, when it desires, to take delivery at the mill and ship on Government bill of lading at the land grant or any other special or reduced rate which may be applicable. Respondents' Exhibit No. 3450, as we have seen, evidences 907 bids of this nature, 807 of them to the Government or other public agencies, and the balance, 32, to railroads. No so-called "control clause" was involved in these bids.

Nowhere is there manifested a greater variance as between trade practices on the West coast and the rest of the country than in this matter of f. o. b. mill bids and, as well, *concessions in price to governmental agencies* coupled with the f. o. b. mill bids. [Comm. Ex. 967-9-N.] Admiral Christian Joy Peoples, Director of Procurement, U. S. Navy, testified for the Commission that he had experienced no difficulty in obtaining f. o. b. mill bids west of Denver. [6 R. 3796.] The 907 Riverside mill bids above referred to certainly bears this out and with equal certainty negatives any attempt on the part of Riverside to deprive the Government of any land grant or other special rates to which it was entitled. So that again we find what the Commission is pleased to term a significant difference in West coast practices.

4. Punitive Bases.

As earlier pointed out, "punitive" bases are unknown in Riverside's sales territory; and the Commission has never contended to the contrary.

5. Trucking.

The evidence was that Riverside sells f. o. b. trucks at mill without premium and has done so for years. [17 R. 13220, 13225.] The number of customers who desire to make such truck pick-ups is, however, negligible. [17 R. 13220.]

None of the evidence cited by the Commission with reference to discouragement of trucking has reference either to Riverside or to its marketing area.

6. Diversions in Transit.

Again we have a situation where there is no evidence of Riverside participation in any activity designed to curb such diversions. In the abstract, however, we may say that Riverside is opposed to diversions for the simple reason that they accomplish the same result—discrimination between purchasers similarly situated—as is proscribed by the Robinson-Patman Act. [See Trial Examiner's Report, 22 R. 15715.]

7. Assisted Standardization of Terms of Sale.

The findings contain nothing, save the omnipresent use of the generic term "respondents," tending to connect Riverside with any of the asserted uniform practices attempted to be found. To the extent that the findings covering those matters are asserted to support the order as against Riverside, the same are not supported by evidence, either as to any asserted uniformity or as to the claim that any alleged similarity was the result of asserted plan or design.

Since the Commission has cited no evidence pertinent to Riverside in this regard, we shall not take the time or space to analyze the evidence as to this phase of the case.

8. Dealer Classifications.

The Commission's chief objection here seems to be that the Government has, in certain instances been compelled to buy through dealers. The evidence as to Riverside was that it has *always* sold direct to the Government save that, for a limited period during the Code and in compliance with its understanding of the Code, it sold local relief agencies through dealers. [Comm. Exs. 1205-D.

1203-O, 1295-A-Z.] Its first post-code price list, as of October 21, 1935, resumed the practice of selling direct to the Government without exception or qualification; and it has continuously carried out this practice since. [Comm. Exs. 1295-3F-3G, 31-3S.]

9. Asserted Discrimination Against Foreign Cement.

The evidence in this regard, so far as Riverside is concerned, is that no appreciable quantity of foreign cement has been imported into Riverside's sales area in the last ten years. [17 R. 13226.]

Neither the report of the Trial Examiner [pars. 151-157, pp. 58-60] nor the findings of the Commission even purport to suggest any activities of the nature charged in the complaint in this regard, so far as either Riverside or its marketing area is concerned.

10. Miscellaneous.

The Commission states (Br., p. 99) that California Portland's and Riverside's destination prices are the same. It should be noted that the Colton and Crestmore mills are about three miles apart and have identical commercial freight rates to all important consuming centers. Since the Commission admits [and alleged in its complaint: 1 R. 241] that "a difference in delivered price of only one cent (1¢) a barrel will deflect the business away from one manufacturer to another," this situation merely evidences what has been obvious all through this case, namely, that the lowest current quotation at any given point estab-

lishes the market price at such point. It was this principle, axiomatic in the cement industry, which led Circuit Judge Major to remark at the oral argument below:

> "By Judge Major: But the argument is that they would not pay even a cent more per barrel, so the natural result would be that there would be identical prices." [Tr. Argt., 7 Cir., p. 160.]

Reference is also made to Riverside's membership in the Pacific Coast Cement Institute. There is no evidence that there was ever any connection between the Cement Institute and the Pacific Coast Institute. It is true that originally the latter was intended to become a division of the former, *but it never did.* The assertion (p. 100) that the Pacific Coast Institute had "close ties" with the Cement Institute is based upon nothing more tangible than wishful thinking. As for Riverside's asserted use of the Pacific Coast Institute's freight rate information, the undisputed evidence was, that while Riverside did from time to time receive information from the former as to land-grant freight rates, it made but little use of such data, preferring to obtain its information direct from the railroads themselves. [17 R. 13224.]

The Commission's last assertion relative to Riverside concerns an exchange of freight rate information as between California Portland and Riverside on the Bartlett Dam job. This was a joint bid by the two companies as to which the facts and advantages to the government arising out of the joint bid were fully disclosed to it. The bid was therefore perfectly legal. *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 476; *Atcheson v. Mallon*, 43 N. Y. 147, 151. The reason for the interest of the

joint bidders in the applicable rates from other mills was perfectly obvious. Knowing that the Government would award on the lowest *destination* cost to it at the point of use, the joint bidders naturally were interested in obtaining some idea as to the transportation cost from competing mills.

11. Conclusion—the Commission Wholly Failed to Prove Any Case as Against Riverside.

The foregoing evidence clearly revealed that the Commission wholly failed to make out any case as against Riverside, even if we were to go so far as to concede that mere membership in the Institute plus an asserted uniformity of practices centering about the use of the basing point method would have warranted a finding (if made) of combination. (See, to the contrary, *Cement Manufacturer's Protective Assn. v. United States*, 268 U. S. 588.)

The evidence as to Riverside was, as we have seen, that it has not employed basing point methods for years; it has never employed the Institute freight rate books; it freely bids f.o.b. mill, thereby giving the Government the benefit of reduced transportation charges; punitive bases in its territory are unknown, as is discrimination against foreign cement and that it has for years permitted truck pick-ups at the mil for the few buyers who desire them. In the face of this clear cut showing the reversal of the Commission's order as to Riverside was not only warranted, but was required, as a matter of plain justice.

III. The Circuit Court of Appeals Did Not Err in Its Rulings on the Incompetency of Certain Evidence.

A. Evidence as to Activities Under the Code.

Title I, Section 5 of the N. I. R. A. (48 Stats. 195) exempted from the provisions of the anti-trust laws any action complying with the provisions of any code, agreement or license approved, prescribed or issued (as was the Cement Code). This exemption extended down to August 13, 1935 (49 Stat. 375.)

Abler briefs than this will argue the absolute incompetency of the evidence of doings under the Code. This respondent proposes to meet the Commission on its own ground.

The Commission's position seems to be that evidence of acts done under the Code were admissible as "background" material and as such relevant *if connected up to show similar activities before or after the immunity period.* Granting this thesis, the evidence of Code activities on the part of Riverside was incompetent *on the Commission's own theory.*

1. Evidence of Riverside's Activities Under the Code Was Incompetent Because Not Connected Up With Proof of Similar Acts Outside of the Immunity Period.

The Commission can hardly deny that practically its whole case was deliberately centered upon asserted uniformity of action during the Code period. At the same time it is a necessary corollary to its use of such evidence, assuming it to be admissible at all, that as against

a respondent such as Riverside, such evidence must have been connected up as to show similar activities outside of the Code immunity period. And this means, in the case of Riverside, activities *after* the expiration of the Code period.

We say this for the reason that at long last the Commission stated in its brief before the Seventh Circuit that it is what the petitioners did *during the existence of the Institute* which constituted the alleged conspiracy. (Comm. Br., 7th Cir., pp. 189, 274.) This avowal is of considerable importance to a respondent in the position of Riverside. Since Riverside did not join the Institute until March 15, 1933 (and then for the purpose of having a voice in the formulation of the cement code; [17 R. 13223]), its acts done prior to that date clearly were not done pursuant to the asserted conspiracy. *Nibbelink v. United States,* 6 Cir., 66 F. (2d) 178, 179. And, since Section 5 of the N. I. R. A. exempted from the anti-trust laws all acts done under the Cement Code until sixty days after June 14, 1935 (49 Stat. 375), which is to say until August 13th of that year, it follows that Riverside's acts done down to that date were legally immune. The result is, that under the Commission's own theory, in order to have connected up its proffered evidence of Riverside's Code activities, it must have shown similar activities on Riverside's part *subsequent to August 13, 1935.* And here the Commission surely meets its Waterloo so far as this respondent is concerned.

Riverside has never denied that it sought to comply with the Code while the same was in effect. Thereafter, however, it drifted away from Code methods and practices.

Among other things, the striking down of the N. I. R. A. resulted in the following changes in its trade practices:

1. Like other West Coast companies, it ceased filing prices *before* the *Schechter** decision. [3 R. 1896.] It may here be noted that during the Code period the Pacific Coast companies filed, not base prices, but price listed destination prices [3 R. 1821], including prices delivered by *truck*. [3 R. 1876.]

2. It changed its classification of customers, instituting direct sales to relief projects and extending the scope of direct sales to owners and contractors. [Comm. Ex. 1295 3H.]

3. It increased its cash discount from 10¢, 15 days, to 20¢, 15 days, and then to 20¢, 10th prox. [Comm. Ex. 1295 3V-4Y.]

4. It eliminated the provision protecting specific work contracts against price increases. [Comm. Ex. 1295 3F-3S, 3V-4Y.]

5. It changed the provision relating to prepayment of freight charges. [Comm. Ex. 1295 4L-5N.]

6. It eliminated the practice of offering to equalize freight. [17 R. 13226, Comm. Ex. 118 A-B.]

7. It wholly ceased to participate in Cement Institute activities. [17 R. 13223.]

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*Schecter Poultry Corp. v. United States, 295 U. S. 495.

All of these changes were radically at variance with practices under the Code. The result necessarily is that the Commission has wholly failed, in Riverside's case, to show a continuation of such practices. It follows that since Riverside did not adhere to those practices *after* the Code, evidence of Code activities was wholly incompetent as against Riverside because not connected up; and the Circuit Court of Appeals was therefore right in declaring such incompetency.

B. The Treanor Letter.

The Circuit Court of Appeals also held the Treanor letter incompetent. If that court was correct, as we respectfully urge that it was, in holding that the Commission had neither proved nor found as to the combination which it alleged, its holding as to the inadmissibility of the letter was equally correct. If there was no conspiracy, there were no co-conspirators whose declarations might be utilized as against the rest, for it is Hornbook law that the declarations of co-conspirators are admissible only *after* proof of the conspiracy and not before. *Nibbelink v. United States, supra*, 6 Cir., 66 F. (2d) 178, 179; *Minner v. United States*, 10 Cir., 57 F. (2d) 506, 511; *Kuhn v. United States*, 9 Cir., 26 F. (2d) 463, 464.

The theory of the Commission seems to be that the letter constituted admissions on the part of the Institute and that it also constituted "appropriate background evidence to show the state of mind of a leader of the industry, prominent in Institute affairs." (Br., p. 89.) But John Treanor was neither alleged nor found to have been a party to the asserted combination and hence his individual state of mind was utterly irrelevant. So also,

and in so far as the Institute was concerned, the latter could not conspire with itself and hence if, as the Circuit Court of Appeals held, there was a failure of proof as to the conspiracy alleged, "the admissions" became equally incompetent even as to it.

Since, however, John Treanor was the president of this respondent when he wrote the letter in question (he died in October of 1935) and since the Commission has always attributed to the missive an importance which was wholly undeserved, this respondent will shoulder the burden of pointing out that John Treanor's philosophy was precisely that which underlay the entire N. I. R. A. program and precisely what this Court upheld in the Sugar Institute case:* open prices openly arrived at.

In repeatedly flaunting this particular letter throughout this interminable proceeding, without giving regard to other contemporaneous writings of John Treanor's which clearly expressed his beliefs, the Commission is palpably guilty of ignoring the rule that an administrative agency should base its findings upon the whole course of conduct revealed by the record, rather than upon isolated portions thereof selected at random and which fail to give a true picture of the factual situation. *N. L. R. B. v. Virginia Electric and Power Co.*, 314 U. S. 469, 479; *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568, 580.

So far as this discussion is concerned, it is only necessary to say that John Treanor was a man who ever sought harmony between Government and business to

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*297 U. S. 553.

the end that to each should be rendered that to which it was entitled—to the Government, compliance with the laws; to business, the opportunity to live within the laws. Indeed, he went further than that. In the very letter under discussion he advocated that which, both during his time and since, has been a cardinal point of Riverside policy: that of giving the Government f. o. b. mill prices whenever it wanted them. The multitude of Riverside f. o. b. mill bids evidenced in this proceeding shows that his actions as an executive of Riverside did not belie his words. [Resp. Ex. 3450.]

For the rest, what did John Treanor mean when he referred in Commission's Exhibit 7A-B to "free competition" and "systematic restraint?" His own writings supply the answer. What John Treanor meant by "free competition" was wholly unrestrained, cut-throat, murderous competition of the price-war variety—that which means ruin and economic hari-kari for all concerned. What he meant by "systematic restraint" was the self-restraint of openly publishing prices on the basis of one price to all and *individually* adhering to them so long as a given published price should be in effect.

On March 5, 1934, John Treanor wrote Mr. Bernard Kilgore of the Wall Street Journal a letter, in which he stated [Comm. Ex. 553-22-3E]:

> "In these circumstances, under the theory of unrestrained competition the price is cut by one producer after another and comes to rest at some irreducible minimum. This eventual minimum resulting from competition is not of course the price which will yield a fair return upon the average investment. Competition goes further than this, wipes out all profit margin, all reserves for maintenance and de-

preciation, exhausts the producer's working capital and finally consumes the funds of his creditors, in so far as they fall temporarily within the control of the producer struggling for survival. Receivership and bankruptcy do not end this cycle of destruction. The plant of the bankrupt is acquired under forced sale at bargain prices and the struggle goes on to the point of ruin for many or most of the participants. This is an old story, but it is also quite up to date, for this is just what has been going on in the cement business for the past three or four years and the process has had a fatal ending for a good number of companies.

"The point which I would like to make is that this aspect of competition is more constantly threatening in the cement business than in any other that I know about, owing to its standardized product, its perennial excess capacity, and to the large proportion of bookkeeping charges entering into cost. When a company is in a fight and in distress it ignores bookkeeping. The indirect, capital, or bookkeeping part of cost representing the fixed capital of the industry, becomes then, in effect, a war fund, a subsidy for the injury or destruction of its competitors.

"Now, it is to the credit of the men responsible for the capital invested in the cement business that, in the face of this peculiar menace, they have been as successful as they have been in avoiding the extreme evils of such a system; that, foreseeing the dismal end-product of unrestrained competition, they have, by forebearance and skill, consciously obtained equilibrium at something above the level of ruin, even sometimes within the zone of profit.

"They have done this, where it has been done, through the open price system and I beg leave to say that in such an industry as ours, it cannot be

done in any other way. The open price system enables sensible men, acting within the law, to avoid ruin and sometimes to make a fair profit."

On April 4, 1934, another letter to Mr. Kilgore contained the following [Comm. Ex. 571-1A-1D]:

"I take no stock in price-fixing, whether of minimum prices or otherwise. I think that orderly competition will remain as an effective regulating force under the open price system, which is the system I regard as adapted to the present phase of industries producing staples. Competition between industries will certainly remain. The cement industry cannot ignore the competition of lumber, clay products and steel and asphalt. It will lose its market if it does so. Demand is a function of price. Certainly, as to my company, I would resist any effort of the NRA or of my industry to maintain a price detrimental to the extension of the use of cement. My company's interests lie in the wide development of such uses and mere self-interest has in the past and will in the future lead me to desire the price which will give wide distribution. Nor, as men are constituted, will competitive action be stifled under the open price system as between the units of an individual industry. Each unit remains free to express its judgment as to the optimum price for its industry and the lowest price selected by one unit governs all the rest in a given area."

On August 27, 1935, not long before his death, John Treanor wrote Dr. Clark of Columbia University as follows [Comm. Ex. 958-4D]:

"The one thing which I personally desired from the NRA was enforcement of the rule that no sales should be made, directly or indirectly, excepting at the price

which the seller holds out to the world as his invariable price to one and all. Personally, I have not been seriously interested in waiting periods, or in any other contraptions. Without these, once the principle of *openness** is established, I believe a decent standard of commercial morality will develop.

"*This is the only restraint upon competition which I consider desirable.* What does it amount to? To the assumption of responsibility for his acts by the man who decides to cut the price. He cuts at once to all his customers. He accepts the consequences at once in a lower price upon all his sales, instead of secretly cushioning himself in his cuts to a few customers, at the expense of all the rest of his customers."

John Treanor's philosophy is, we think, clear. What he obviously had in mind was one price on the part of each manufacturer, known to and open to all competing buyers and competing sellers alike, with a resultant elimination of secret rebates and other discriminatory concessions. This is precisely the philosophy underlying legislation such as the Robinson-Patman Act.

It is respectfully urged that, competent or incompetent, and under *all* of the facts, the Treanor letter proves exactly nothing so far as the Commissioner's case is concerned.

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*Italics Mr. Treanor's.

IV. The Evidence Is Insufficient to Support Any Finding or Order Against Riverside Under Count II of the Complaint.

As has been previously indicated, Riverside is compelled to absorb freight on its sales in Arizona east of Phoenix, because of the effect of El Paso's freight advantage upon the cement price structure.

The Commission contends that the term "price," under the Robinson-Patman amendment to Section 2 of the Clayton Act, means price at the mill after deduction of transportation from the delivered price. As a corollary to this it asserts that, in the event of freight absorptions in territory adjacent freight-wise to a competing mill (here El Paso), discrimination within the meaning of the Act occurs as to customers in the territory where the absorbing mill (here Riverside) has its own freight advantage.

It should also be borne in mind that due to deserts and distance there is no competition between dealers or other purchasers in California and those in Arizona or Nevada, nor between buyers in Yuma and other western border points in Arizona on the one hand and those in the consuming centers around Phoenix and Prescott, where the California and El Paso rates are blanketed, on the other, nor between the purchasers in central Arizona and those in the sparsely settled eastern areas where El Paso has its freight advantage. [17 R. 13059, 13062-63.]

It will be immediately seen that the practical question under Count II so far as Riverside is concerned is simply whether there shall be four companies competing in eastern Arizona or one; a factor which the Commission has persistently refused to recognize.

Recourse to the discussion in Congress in connection with the Robinson-Patman amendment wholly refutes the Commission's theories.

In the first place, the 74th Congress point blank refused to enact an amendment defining price as the amount received by the vendor after deducting transportation charges; which is what the Commission now asserts to be the "true price." H. R. 8442, 74th Cong., 2d Sessn.; and see discussions at 80 Cong. Rec. 8122, 8223-4, 9903-4. The result was, as pointed out by this Court in the *Corn Products* case,* that Congress refused to require f. o. b. mill pricing.

A. "Price" Means Destination Price as Between Truly Competitive Buyers.

In the second place, the discussions in Congress amply showed that purchasers sought to be shielded from the proscribed discrimination were purchasers *similarly situated;* which is to say, actually in competition in the same market or trade area. 80 Cong. Rec. 8123, 8229-30, 9416.

In the third place, Congress also refused point blank to confer upon the Federal Trade Commission power to regulate freight absorptions in cases such as Riverside here presents. 80 Cong. Rec. 8239-40.

The palpable result is that by its Count II the Commission is attempting to circumvent the will of Congress in at least three different respects.

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*324 U. S. 726.

Congress has clearly indicated that "price" is that paid by buyers who are in competition with each other. Certainly a cement dealer, say in Tucson, and another in Bisbee, who are separated by over a hundred miles of desert and sagebrush, obviously do not compete against each other at all. Still less may it be said that a dealer at either of those points competes with a dealer, say at Riverside, California, to whom it is obviously a matter of supreme indifference whether or not Riverside absorbs a few cents of freight in order to compete in eastern Arizona. On the other hand, should the Commission's views prevail and the California mills be required to withdraw from eastern Arizona, leaving but one mill instead of four to supply the needs of that area, we are inclined to believe that the consuming public east of Tucson would hardly regard the possible end-products of a diminished supply of available cement as being an unmixed blessing.

It is respectfully urged that the judgment of the Circuit Court of Appeals reversing the Commission's order as to Riverside, should be affirmed upon each and all of the grounds and for the reasons, jurisdictional and otherwise, specified by this and other respondents in these several causes.

Respectfully submitted,

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